A variation of this problem arises in discussions of 'false consciousness'. How can feminists wedded to experiential analysis respond to women who reject feminism's basic premises as contrary to their experience? In an extended footnote to an early article, Catharine MacKinnon noted:

> Feminism aspires to represent the experience of all women as women see it, yet criticises anti-feminism and misogyny, including when it appears in female form. [Conventional responses treat] some women's views as unconscious conditioned reflections of their oppression, complicitous in it. [This approach] criticises the substance of a view because it can be accounted for by its determinants. But if both feminism and anti-feminism are responses to the condition of women, how is feminism exempt from devalidation by the same account? That feminism is critical and anti-feminism is not, is not enough, because the question is the basis on which we know something is one or the other when women, all of whom share the condition of women, disagree.[154]

Yet having raised the problem, MacKinnon declined to pursue it. As a number of feminist reviewers have noted, MacKinnon has never reconciled her unqualified condemnation of opponents with her reliance on experiential methodology.[155]

The issue deserves closer attention, particularly since contemporary survey research suggests that the vast majority of women do not experience the world in the terms that most critical feminists describe. Nor do these feminists agree among themselves about which experiential accounts of women's interests should be controlling in disputes involving, for example, pornography, prostitution, surrogate motherhood, or maternity leave.

A related issue is how any experiential account can claim special authority. Most responses to this issue take one of three forms. The first approach is to invoke the experience of exclusion and subordination as a source of special insight. According to Menkel-Meadow the 'feminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique begins – and, some would argue, remains – in a male-constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced'.[156] Yet such 'standpoint' theories, if left unqualified, present their own problems of privilege. There remains the issue of whose standpoint to credit, since not all women perceive their circumstances in terms of domination and not all who share that perception agree on its implications. Nor is gender the only source of oppression. Other forms of subordination, most obviously class, race, ethnicity, and sexual orientation, can yield comparable and, in some instances competing, claims to subjugated knowledge. To privilege any single trait risks impeding coalitions and understating other forces that constitute our identities.

A second feminist strategy is to claim that women's distinctive attributes promote a distinctive form of understanding. Robin West has argued, for example, that –

> there is surely no way to know with any certainly whether women have a privileged access to a way of life that is more nurturant, more caring, more natural, more loving, and thereby more moral than the lives which both men

154 CA MacKinnon, 'Feminism, Marxism and State' (1982) 7 *Signs* at 637, n 5.

155 See West, *op cit*, pp 117–18.

156 Menkel-Meadow, *op cit*, p 61.

> and women presently pursue in the public sphere, including the legal sphere of legal practice, theory, and pedagogy. But it does seem that whether by reason of sociological role, psychological upbringing or biology, women are closer to such a life.[157]

Such claims occur in more muted form in much of the legal scholarship that draws on relational strands of feminist theory. This line of analysis, popularised by Carol Gilligan, argues that women tend to reason in 'a different voice'; they are less likely than men to privilege abstract rights over concrete relationships and are more attentive to values of care, connection, and context.[158] The strength of this framework lies in its demand that values traditionally associated with women be valued and that legal strategies focus on altering societal structures, not just assimilating women within them. Such an approach can yield theoretical and political cohesiveness on initiatives that serve women's distinctive needs.

Yet such efforts to claim an authentic female voice illustrate the difficulty of theorising from experience without essentialising or homogenising it. There is no 'generic woman',[159] or any uniform 'condition of women'.[160] To divide the world solely along gender lines is to ignore ways in which biological constraints are experienced differently by different groups under different circumstances. If, as critical feminists generally maintain, women's experience has been shaped through culturally contingent patterns of subordination, no particular experience can claim universal authentic status. Moreover, to emphasise only the positive attributes traditionally associated with women is to risk overclaiming and oversimplifying their distinctive contributions. Most empirical work on moral reasoning and public values discloses less substantial gender differences than relational frameworks generally suggest.[161] These frameworks also reinforce dichotomous stereotypes – such as males' association with abstract rationality and females' with empathetic nurturance – that have restricted opportunities for both sexes.

Such concerns underpin those strands of critical feminism that focus on challenging rather than celebrating sex-based difference. The virtue of their approach lies in revealing how legal ideology has misdescribed cultural constructions as biological imperatives. Yet the strengths of this framework also suggest its limitations. Affirmations of similarity between the sexes may inadvertently institutionalise dominant social practices and erode efforts to build group solidarity. Denying difference can, in some contexts, reinforce values that critics seek to change.

A more promising response to the 'difference dilemma' and to more general questions about feminist epistemology is to challenge the framework in which these issues are typically debated. The crucial issue becomes not difference, but the difference that difference makes. In legal contexts, the legitimacy of sex-based

157 West, *op cit*, p 48.

158 See Carol Gilligan, *In a Different Voice* (1982); Mary Field Belenky, Blythe McVickar Clinchy, Nancy Rule Goldberger and Jill Mattuck Tarule, *Women's Ways of Knowing* (1986); Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Woman's Lawyering Process' (1985) 1 *Berkeley Women's LJ* 39. (Extracted in Chapter 6.)

159 The phrase is Elizabeth Spelman's in *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988), p 188. See also Adrenne Rich, 'Disloyal to Civilisation: Feminism, Racism, Gynephobia' in *On Lies, Secrets and Silence*' (1979), p 275.

160 CA MacKinnon, *op cit*, p 637, n 5.

161 D Rhode, *Justice and Gender*, pp 311–12.

treatment should not depend on whether the sexes are differently situated. Rather, analysis should turn on whether legal recognition of gender distinctions is likely to reduce or reinforce gender disparities in power, status, and economic security. Since such issues cannot be resolved in the abstract, this strategy requires contextual judgments, not categorical choices. It asks which perspective on difference can best serve particular theoretical or practical objectives and recognises that there may be trade-offs between them. Such an approach demands that feminists shift self-consciously among needs to acknowledge both distinctiveness and commonality between the sexes and unity and diversity among their members.

On the more general question of what validates any particular feminist claim, the first step is to deconstruct the dualistic framework of truth and falsehood in which these issues are often discussed. As postmodernist theorists remind us, all perspectives are partial, but some are more incomplete than others. To disclaim objective standards of truth is not to disclaim all value judgments. We need not become positivists to believe that some accounts of experience are more consistent, coherent, inclusive, self-critical, and so forth. Critical feminism can illuminate the process by which claims about the world are constituted as well as the effects of marginalising women and other subordinate groups in that process. Such a framework can subject traditional forms of argument and criteria of relevance to sustained scrutiny. It can challenge exclusionary institutions in which knowledge is constructed. And it can press for social changes that would encourage deeper understanding of our experience and the forces that affect it.

Although critical feminists by no means speak with one voice on any of these issues, part of our strength lies in building on our differences as well as our commonalities. Precisely because we do not share a single view on this, or other more substantive concerns, we need theories but not a Theory. Our objective should be multiple accounts that avoid privileging any single universalist or essentialist standpoint. We need understandings that can resonate with women's shared experience without losing touch with our diversity. The factors that divide us can also be a basis for enriching our theoretical perspectives and expanding our political alliances. Any framework adequate to challenge sex-based oppression must simultaneously condemn the other forms of injustice with which it intersects.

What allies this method with other critical accounts is its scepticism toward everything, including scepticism. Critical feminist theories retain a commitment to locate judgment within the patterns of social practice, to subject that judgment to continuing critique, and to promote gender equality as a normative ideal. Those commitments may take us in multiple directions, but as Martha Minow maintains, they are unifying commitments nonetheless.[162]

2. Liberal Legalism

For CLS theorists, the most frequent unifying theme is opposition to a common target: the dominance of liberal legalism and the role law has played in maintaining it.[163] On this issue, critical feminism offers more varied and more ambivalent responses. This diversity in part reflects the diversity of perspectives within the liberal tradition. The target appearing in many critical legal studies

162 Martha Minow, 'Beyond Universality' (1989) *U Chi Legal F* 115.

163 Robert W Gordon, 'New Developments in Legal Theory', in *The Politics of Law: A Progressive Critique*, p 281; A Hutchinson, 'Introduction to Critical Legal Studies', in A Hutchinson (ed) (1989).

accounts and in some critical feminist analyses is only one version of liberal legalism, generally the version favoured by law and economics commentators. Under a more robust framework, many inequalities of greatest concern to feminists reflect limitations less in liberal premises than in efforts to realise liberalism's full potential.

From both a philosophical and pragmatic standpoint, feminist legal critics have less stake in the assault on liberalism than CLS. Their primary target is gender inequality, whatever its pedigree, and their allies in many concrete political struggles have come as often from liberal as from radical camps. Thus, when critical feminist theorists, join the challenge to liberal legalism, they often do so on somewhat modified grounds. Their opposition tends to focus on the particular form of liberalism embodied in existing legal and political structures and on the gender biases it reflects.

Although they differ widely in other respects, liberal theorists generally begin from the premise that the State's central objective lies in maximising individuals' freedom to pursue their own objectives to an extent consistent with the same freedom for others. Implicit in this vision are several assumptions about the nature of individuals and the subjectivity of values. As conventionally presented, the liberal State is composed of autonomous, rational individuals. Their expressed choices reflect a stable and coherent understanding of their independent interests. Yet while capable of full knowledge of their own preferences, these liberal selves lack similar knowledge about others. Accordingly, the good society remains as neutral as possible about the meaning of the good life: it seeks simply to provide the conditions necessary for individuals to maximise their own preferences through voluntary transactions. Although liberal theorists differ widely about what those background conditions entail, they share a commitment to preserving private zones for autonomous choices, free from public intervention.[164]

Critical feminist theorists have challenged this account along several dimensions. According to theorists such as West, these liberal legalist selves are peculiarly masculine constructs – peculiarly capable of infallible judgments about their own wants and peculiarly incapable of empathetic knowledge about the wants of others.[165] Classic liberal frameworks take contractual exchanges rather than affiliative relationships as the norm. Such frameworks undervalue the ways social networks construct human identities and the ways individual preferences are formed in reference to the needs and concerns of others. For many women, a nurturing, giving self has greater normative and descriptive resonance than an autonomous, egoistic self.[166]

Critical feminists by no means agree about the extent, origins, or implications of such gender differences. Some concept of autonomy has been central to the American women's movement since its inception, autonomy from the constraints of male authority and traditional roles. How much emphasis to place on values

164 See John Rawls, *A Theory of Justice* (1971); Ronald Dworkin, 'Liberalism in Public Morality', in S Hampshire (ed) (1978), p 113; Bruce Ackermanm, *Social Justice in the Liberal State* (1980). See generally Steven Shiffrin, 'Liberalism, Radicalism and Legal Scholarship' (1983) 30 *UCLA L Rev* 1103.

165 Robin West, 'Economic Man and Literary Women: One Contrast' (1988) 39 *Mercer L Rev* 867.

166 A Jaggar, *op cit*, pp 21–22; Virginia Held, 'Feminism and Moral Theory', in E Kittay and D Meyers (eds), *Women and Moral Theory* (1987), p 111; Susan Moller Okin, 'Humanist Liberalism' in N Rosenblum (ed), *Liberalism and the Moral Life* (1989), p 39; Robin West, 'Jurisprudence and Gender' (1988) 55 *U Chi L Rev* 1 (extracted in Chapter 6).

of self-determination and how much to place on values of affiliation have generated continuing controversies that cannot be resolved at the abstract level on which debate has often foundered. Even critical feminists who agree about the significance of difference disagree about its causes and likely persistence. Disputes centre on how much importance is attributable to women's intimate connection to others through childbirth and identification with primary caretakers, how much to cultural norms that encourage women's deference, empathy, and disproportionate assumption of nurturing responsibilities and how much to inequalities in women's status and power.

Yet despite these disagreements, most critical feminists share an emphasis on the importance of social relationships in shaping individual preferences. From such a perspective, no adequate conception of the good society can be derived through standard liberal techniques, which hypothesise social contracts among atomistic actors removed from the affiliations that give meaning to their lives and content to their choices.

This feminist perspective points up a related difficulty in liberal frameworks, which critical theorists from a variety of traditions have noted. The liberal assumption that individuals' expressed preferences can be taken as reflective of genuine preferences is flatly at odds with much of what we know about human behaviour. To a substantial extent, our choices are socially constructed and constrained; the desires we develop are partly a function of the desires our culture reinforces. As long as gender plays an important role in shaping individual expectations and aspirations, expressed objectives cannot be equated with full human potential. Women, for example, may 'choose' to remain in an abusive relationship, but such choices are not ones most liberals would want to maximise. Yet a liberal legalist society has difficulty distinguishing between 'authentic' and 'inauthentic' preferences without violating its own commitments concerning neutrality and the subjectivity of value.

Similar problems arise with the legal ideology that underpins contemporary liberal frameworks. In its conventional form, liberal legalism assumes that appropriate conduct can be defined primarily in terms of adherence to procedurally legitimate and determinate rules, that law can be separated from politics, and that spheres of private life can be insulated from public intrusion.[167] Critical feminism challenges all of these assumptions on both empirical and normative levels.

The feminist critique joins other CLS work in denying that the rule of law in fact offers a principled, impartial, and determinate means of dispute resolution. Attention has centred both on the subjectivity of legal standards and the gender biases in their application. By exploring particular substantive areas, feminists have underscored the law's fluctuation between standards that are too abstract to resolve particular cases and rules that are too specific to result in principled, generalisable norms.[168] Such explorations have also revealed sex-based assumptions that undermine the liberal legal order's own aspirations.

These limitations in conventional doctrine are particularly apparent in the law's consistently inconsistent analysis of gender difference. Decision-makers have often reached identical legal results from competing factual premises. In other

167 See Judith N Schklar, *Legalism* (1964); Duncan Kennedy, 'Legal Formality' (1973) 2 *J Legal Stud* at 351, 371–72; Karl Klare, 'Law-Making as Praxis' (1970) 40 *Telos* pp 123, 132.

168 See Clare Dalton, 'An Essay in the Deconstruction of Contact Doctrine' (1985) 95 *Yale LJ* pp 997, 1106–08.

cases, the same notions about sexual distinctiveness have yielded opposite conclusions. Identical assumptions about woman's special virtues or vulnerabilities have served as arguments for both favoured and disfavoured legal treatment in criminal and family law and for both including and excluding her from public roles such as professional occupations and jury service. For example, although courts and legislatures traditionally assumed that it was 'too plain' for discussion that sex-based distinctions in criminal-sentencing statutes and child custody decisions were appropriate, it was less plain which way those distinctions cut. Under different statutory schemes, women received lesser or greater punishments for the same criminal acts and in different historical periods were favoured or disfavoured as the guardians of their children.[169]

The law's traditional approach to gender-related issues has not only yielded indeterminate interpretations; it has allowed broad mandates of formal equality to mask substantive inequality. Part of the problem with 'difference' as an organising principle is that legal decision makers do not always seem to know it when they see it. One of the most frequently noted illustrations is the Supreme Court's 1974 conclusion that pregnancy discrimination did not involve gender discrimination or even 'gender as such'; employers were simply distinguishing between 'pregnant women and non-pregnant persons'.[170] So too, although most contemporary divorce legislation promises 'equal' or 'equitable' property distributions between spouses, wives have in practice received neither equality nor equity. In the vast majority of cases, women end up with far greater caretaking responsibilities and far fewer resources to discharge them.[171]

Such indeterminancies and biases also undermine the liberal legalist distinction between public and private spheres. From a critical feminist view, the boundary between State and family is problematic on both descriptive and prescriptive grounds. As an empirical matter, the State inevitably participates in determining what counts as private and what forms of intimacy deserve public protection. Governmental policies concerning child care, tax, inheritance, property, welfare, and birth control have all heavily influenced family arrangements. As Fran Olsen and Clare Dalton have noted, the same legal decisions regarding intimate arrangements often can be described either as intervention or non-intervention, depending on the decision-makers' point of view. For example, a refusal to enforce unwritten co-habitation agreements can be seen as a means of either preserving or intruding on intimate relationships.[172]

Conventional public/private distinctions present normative difficulties as well. Contrary to liberal legalist assumptions, the State's refusal to intervene in private matters has not necessarily expanded individual autonomy; it has often simply substituted private for public power. The courts' failure to recognise unwritten agreements between co-habitants or to enforce support obligations and rape

169 See Frances Olsen, 'The Politics of Family Law' (1984) 2 *Law and Inequality* at 1, 12–19.

170 *Geduldig v Aiello* 417 US 484 at 497, n 20 (1974); see also *General Electric Co v Gilbert* 429 US 125 (1976).

171 Lenore J Weitzman, *The Divorce Revolution* (1985); Herma Hill Kay, 'Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath' (1987) 56 *U Cin LR* at 1, 60–65; Deborah Rhode and Martha Minow, 'Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Reform', in S Sugarman and H Kay (eds), *Divorce Reform at the Crossroads* (1990).

172 Dalton, at 1107; Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *U Mich J L* Ref 835.

prohibitions in ongoing marriages has generally enlarged the liberties of men at the expense of women.[173]

Critical feminism does not, however, categorically renounce the constraints on the State power that liberal legalism has secured. Rather, it denies that conventional public/private dichotomies provide a useful conceptual scheme for assessing such constraints. As the following discussion of rights suggests, judgments about the appropriate scope of State intervention require a contextual analysis, which takes account of gender disparities in existing distributions of power. In this, as in other theoretical contexts previously noted, we need less reliance on abstract principles and more on concrete experience.

A similar point emerges from one final challenge to liberal legalism. Building on the work of moral theorists such as Carol Gilligan, Annette Baier, and Sarah Ruddick, some commentators have questioned the primacy that this culture attaches to formal, adversarial, and hierarchical modes of dispute resolution.[174] A legal system founded on feminist priorities – those emphasising trust, care, and empathy – should aspire to less combative, more conciliatory, procedures.

Yet as other feminist critics have noted, an appeal to empathetic values leaves most of the difficult questions unanswered. With whom should legal decision making empathise when individual needs conflict?[175] And what procedural protections should be available to monitor those judgments? One risk is that conciliation between parties with unequal negotiating skills, information, and power can perpetuate those inequalities. Judicial systems that have aspired to a more nurturing processes, such as juvenile and family courts, have often reinforced patriarchal assumptions and sexual double standards.[176] Norms appropriate to our vision of justice in an ideal state may not be the best way to get us there.

Here again, a critical feminist approach to procedural values demands contextual judgment to further the substantive objectives that critical feminism seeks. Its greatest challenge lies at the pragmatic level; its task is to design frameworks more responsive to the experiences of subordinate groups. A crucial first step is to deconstruct the apparent dichotomy between formalism and informalism that has traditionally structured debate over alternative dispute resolution processes. Since neither approach has adequately responded to women's experiences and concerns, we cannot rest with debunking both possibilities or choosing the least objectionable alternative. Rather, as is true with debates over substantive rights, we need to re-imagine the range of procedural options and to challenge the broader system of sex-based subordination that constrains their exercise.

One central difference between critical feminism and other critical legal theory involves the role of rights. Although both bodies of work have challenged liberal legalism's reliance on formal entitlements, feminist accounts, like those of

173 See MDA Freeman and Christina Lyon, *Cohabitation Without Marriage: An Essay in Law and Social Policy* (1983); Diana EH Russel, *Rape in Marriage* (1982), pp 17–24; F Olsen, *op cit*, pp 843–58; Marjorie Maguire Shultz, 'Contractual Ordering of Marriage: A New Model for State Policy' (1982) 70 *Calif L Rev* 204.

174 C Gilligan; Annette Baier, 'Trust and Antitrust' (1986) 96 *Ethics* at 231, 247–53; Sara Ruddick, 'Maternal Thinking' (1980) 6 *Feminist Studies* 3342; see Lynne Henderson, 'Legality and Empathy' (1987) 85 *Michigan L Rev* 1574; C Menkel-Meadow *op cit*.

175 Toni Masaro, 'Empathy, Legal Storytelling, and the Rule of Law' (1989) 87 *Michigan L Rev* 2104.

176 Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Judges' (1988) 61 *S Cal L Rev* 1877, 1926–33.

minority scholars, have tended more toward contextual analysis than categorical critique.

Most CLS scholarship has viewed rights-based strategies as an ineffective and illusory means of progressive social change. While sometimes acknowledging the importance of basic political liberties in preserving opportunities for dissent, critical legal theorists have generally presented the liberal rights agenda as a constraint on individual consciousness and collective mobilisation. Part of the problem arises from the indeterminacy noted earlier. Feminist commentators such as Fran Olsen have joined other critical theorists in noting that rights discourse cannot resolve social conflict but can only restate it in somewhat abstract, conclusory form. A rights-oriented framework may distance us from necessary value choices and obscure the basis on which competing interests are accommodated.[177]

According to this critique, too much political energy has been diverted into battles that cannot promise significant gains. For example, a decade's experience with State equal rights amendments reveals no necessary correlation between the standard of constitutional protection provided by legal tribunals and the results achieved. It is unlikely that a federal equal rights amendment would have ensured the vast array of substantive objectives that its proponents frequently claimed. Supporters' tendencies to cast the amendment as an all-purpose prescription for social ills – the plight of displaced homemakers, the feminisation of poverty, and the gender gap in earnings – have misdescribed the problem and misled as to the solution.[178]

A related limitation of the liberal rights agenda involves its individualist premises and restricted scope. A preoccupation with personal entitlements can divert concern from collective responsibilities. Rights rhetoric too often channels individuals' aspirations into demands for their own share of protected opportunities and fails to address more fundamental issues about what ought to be protected. Such an individualistic framework ill serves the values of cooperation and empathy that feminists find lacking in our current legal culture.

Nor are mandates guaranteeing equality in formal rights adequate to secure equality in actual experience as long as rights remain restricted to those that a predominately white upper-middle-class male judiciary has been prepared to regard as fundamental. No legal structure truly committed to equality for women would end up with a scheme that affords extensive protection to the right to bear arms or to sell violent pornography but not to control our reproductive lives.

In a culture where rights have been defined primarily in terms of 'freedoms from' rather than 'freedoms to', many individuals lack the resources necessary for exercising rights to which they are formally entitled. Such problems are compounded by the costs and complexities of legal proceedings and the maldistribution of legal services available to enforce formal entitlements or prevent their curtailment. By channelling political struggles into legal disputes,

177 F Olsen, 'Statutory Rape: A Feminist Critique of Rights' (1984) 63 *Texas L Rev*; see Peter Gabel, 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' (1984) 62 *Texas L Rev* 1563; Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas L Rev* at 1363, 1382–84.

178 See D Rhode, *Justice and Gender*, p 16; Catharine A MacKinnon, 'Unthinking ERA Thinking' (Book Review) (1987) 54 *U Chi L Rev* 759.

rights-based strategies risk limiting aspirations and reinforcing dependence on legal decision makers.

Yet while acknowledging these limitations, critical feminism has also emphasised certain empowering dimensions of rights strategies that other CLS work discounts. As theorists including Kimberly Crenshaw, Christine Littleton, Elizabeth Schneider, and Patricia Williams have argued, legal rights have a special resonance in our culture.[179] The source of their limitations is also the source of their strength. Because claims about rights proceed within established discourse, they are less readily dismissed than other progressive demands. By insisting that the rule of law make good on its own aspirations, rights-oriented strategies offer a possibility of internal challenge that critical theorists have recognised as empowering in other contexts.

So too, critiques that focus only on the individualist premises of rights rhetoric obscure its collective dimensions. The dichotomies often drawn between rights and relationships or rights and responsibilities are highly exaggerated. Rights not only secure personal autonomy; they also express relationships between the individual and the community. Just as rights can impose responsibilities, responsibilities can imply rights. Often the concepts serve identical ends: a right to freedom from discrimination imposes a responsibility not to engage in it. Discarding one form of discourse in favour of another is unlikely to alter the foundations of our legal culture. Moreover, for subordinate groups, rights-based frameworks have supported demands not only for individual entitlements but also for collective self-hood. For example, women's right to reproductive autonomy is a prerequisite to their social equality; without control of their individual destinies, women cannot challenge the group stereotypes and role constraints that underpin their subordinate status. Claims of right can further advance collective values by drawing claimants within a community capable of response and demanding that its members take notice of the grievances expressed.[180]

For critical feminism, the most promising approach is both to acknowledge the indeterminate nature of rights rhetoric and to recognise that in particular circumstances, such rhetoric can promote concrete objectives and social empowerment. Too often, rights have been abstracted from their social context and then criticised as abstract. Yet however manipulable, the rubric of autonomy and equality have made enormous practical differences in the lives of subordinate groups. Undermining the conceptual foundations of rights like privacy, on which women's reproductive choice has depended, involves considerable risks. Even largely symbolic campaigns, such as the recent ERA struggle, can be highly important, less because of the specific objective they seek than because of the political mobilisation they inspire. Like the suffrage movements half a century earlier, the contemporary constitutional battle offered women invaluable instruction in both the limits of their own influence and the strategies necessary to expand it.

179 Kimberley Williams Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law' (1988) 101 *Harv L Rev* 1331 at 1366–69; Schneider, 'The Dialictic of Rights and Politics' (1986) 61 *NYU L Rev* 589; Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harv CR*-CLL Rev 401.

180 See Schneider; Marth Minow, 'Interpreting Rights: An Essay for Robert Cover' (1987) 96 Y*ale LJ* 1860 at 1875–77.

Whatever its inadequacies, rights rhetoric has been the vocabulary most effective in catalysing mass progressive movements in this culture. It is a discourse that critical feminists are reluctant to discard in favour of ill-defined or idealised alternatives. The central problem with rights-based frameworks is not that they are inherently limiting but that they have operated within a limited institutional and imaginative universe. Thus, critical feminism's central objective should be not to delegitimate such frameworks but, rather, to recast their content and recognise their constraints. Since rights-oriented campaigns can both enlarge and restrict political struggle, evaluation of their strategic possibilities requires historically situated contextual analysis.

On this point, feminists join other critical theorists in seeking to build on the communal, relational, and destabilising dimensions of rights-based arguments.[181] Claims to self-determination can express desires not only for autonomy but also for participation in the communities that shape our existence. If selectively invoked, the rhetoric of rights can empower subordinate groups to challenge the forces that perpetuate their subordination.

Alternative Visions

One final issue on which critical feminism often parts company with other critical theory involves the construction of alternative visions of the good society. Although both traditions reflect considerable ambivalence about the value of such projects, the focus of concern varies. Most critical theory that has attempted to construct alternative visions assumes away the problems with which feminists have been most concerned or opens itself to the same challenges of indeterminacy that it has directed at other work. Partly for these reasons, feminist legal critics have devoted relatively little attention to idealised programmes. Rather, their efforts have centred on identifying the values that must be central to any affirmative vision and the kinds of concrete legal and institutional transformations that such values imply.

A recurrent problem with most progressive Utopian frameworks involves their level of generality. Objectives are often framed in terms of vague, seemingly universal aspirations – such as Roberto Unger's appeal to a world free 'from deprivation and drudgery, from the choice between isolation from other people and submission to them'.[182] Such formulations leave most of the interesting questions unanswered. How are such ideals to be interpreted and implemented under specific circumstances, how are interpretive disputes to be resolved; and how are gender relations to be reconstructed?

In response to such questions, a standard critical strategy is to specify conditions under which answers would be generated. Habermas's ideal speech situation has been perhaps the most influential example. Under his theory, beliefs would be accepted as legitimate only if they could have been acquired through full uncoerced discussion in which all members of society participate. Some critical feminists, including Drucilla Cornell and Seyla Benhabib, draw on similar conversational constructs.[183]

181 See Staughton Lynd, 'Communal Rights' (1984) 62 *Texas L Rev* 1417; Roberto M Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harv L Rev* 561 at 612–16.

182 See Unger, p 651; see also R Unger, pp 18, 24.

183 See Seyla Benhabib, 'The Generalised and the Concrete Other', in J Benhabib and D Cornell (eds), *Feminism as Critique* (1987), pp 92–94; see also J Habermas, Richard J Bernstein, 'Philosophy', in R Hollinger (ed), *The Conversation of Mankind in Hermaneutics and Praxis* (1985), pp 54, 82.

Such strategies are, however, problematic on several levels. One difficulty involves the level of abstraction at which the ideals are formulated. It is not self-evident how individuals with diverse experiences, interests, and resources will reach consensus or how their agreements can be predicted with enough specificity to provide adequate heuristic frameworks. Strategies emphasising uncoerced dialogue have often assumed away the problems of disparate resources and capacities that parties bring to the conversation. Given the historical silencing of women's voices, many critical feminists have been unsatisfied by approaches that are themselves silent about how to prevent that pattern from recurring.

A related difficulty stems from idealists' faith in dialogue as the primary response to social subordination. Alternative visions that proceed as if the central problem were our inability to imagine such alternatives often understate the material conditions that contribute to that inability. Many feminists have no difficulty imagining a world without pervasive sexual violence or the feminisation of poverty; the difficulty lies in commanding support for concrete strategies that would make that vision possible. It is, of course, true that we cannot be free from coercive institutional structures as long as we retain an ideology that legitimates them. But neither can we rid ourselves of that ideology as long as such structures limit our ability to challenge it.

In response to this dilemma, critical feminism has tended to focus on particular issues that implicate both material and ideological concerns. Rather than hypothesising some universal Utopian programme, feminist legal critics have generally engaged in more concrete analysis that challenges both structural inequalities and the normative assumptions that underlie them. In evaluating particular strategies, critical feminism focuses on their capacity to improve women's social and economic status; to reach those women most in need; and to enhance women's self-respect, power, and ability to alter existing institutional arrangements.

For example, the struggle for comparable pay for jobs of comparable worth presents direct opportunities to increase women's financial security. The campaign has helped reveal the cultural undervaluation of 'women's work' has exposed gender and racial bias in employers' own criteria for compensation, and has aided workplace organising efforts.[184] Pay equity initiatives have also raised broader questions about market principles and social priorities. How should we reward various occupational and worker characteristics and how should those decisions be made? Are we comfortable in a society that pays more to parking attendants than child care attendants, whatever the gender composition of those positions? The struggle for comparable worth could spark a rethinking of the scope of inequality and the ideologies that sustain it.

The feminist focus on concrete issues has avoided an idealised vision that must inevitably change in the course of change. Feminist legal critics have been less interested in predicting the precise role that gender would play in the good society than in undermining its role in this one. Whether sex would ultimately become as unimportant as eye colour or whether some sex-linked traits and affiliations would endure is not an issue on which more speculation seems fruitful. Since what is now problematic about gender relations is the disparity in power, we cannot fully anticipate the shape of those relations in an ideal world

184 See D Rhode, *Justice and Gender*, pp 368–69. See generally *Comparable Worth: New Directions for Research* (H Hartmann (ed), 1985).